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Draft uniform rules on the legal aspects of electronic data interchange (EDI) and related means of trade data communication

Note by the Secretariat

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INTRODUCTION

1. At its twenty-fourth session, in 1991, the Commission agreed to undertake work on the legal issues of electronic data interchange (EDI) in recognition of the fact that those legal aspects would become increasingly important as the use of EDI developed. The Commission was agreed that, given the number of issues involved, the matter needed detailed consideration by a working group. [1] Pursuant to that decision, the Working Group on International Payments devoted its twenty-fourth session to identifying and discussing the legal issues arising from the increased use of EDI.

2. At its twenty-fifth session, in 1992, the Commission had before it the report of the Working Group on International Payments on the work of its twenty-fourth session (A/CN.9/360). In line with the suggestions of the Working Group, the Commission agreed that there existed a need to investigate further the legal issues of EDI and to develop practical rules in that field. It was agreed that, while no decision should be made at that early stage as to the final form or the final content of the legal rules to be prepared, the Commission should aim at providing the greatest possible degree of certainty and harmonization.

3. After discussion, the Commission endorsed the recommendation contained in the report of the Working Group (ibid., paras. 129-133) and entrusted the preparation of legal rules on EDI to the Working Group on International Payments, which it renamed the Working Group on Electronic Data Interchange. [2]

4. The Working Group on Electronic Data Interchange undertook this task at its twenty-fifth session held in New York from 4 to 15 January 1993. At that session, the Working Group reviewed a number of legal issues set forth in a note prepared by the Secretariat (A/CN.9/WG.IV/WP.55). The Working Group agreed that it should proceed with its work on the assumption that the uniform rules should be prepared in the form of statutory rules. The Working Group deferred, however, a final decision as to the specific form that those statutory rules should take (A/CN.9/373, para. 34). At the conclusion of the session, the Working Group requested the Secretariat to prepare draft provisions, with possible variants based on the deliberations and decisions of the Working Group during the session, for its consideration at its next meeting (A/CN.9/373, para. 10).

5. This note contains the draft provisions requested by the Working Group together with a commentary.

6. At its twenty-sixth session, held at Vienna from 5 to 23 July 1993, the Commission had before it the report of the Working Group on Electronic Data Interchange on the work of its twenty-fifth session (A/CN.9/373). The Commission expressed its appreciation for the work

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[1] Report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session, Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17), paras. 306-317.

[2] Report of the United Nations Commission on International Trade Law on the work of its twenty-fifth session, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

accomplished by the Working Group. The Commission noted that the Working Group had started discussing the content of a uniform law on EDI and expressed the hope that the Working Group would proceed expeditiously with the preparation of that text.

7. The view was expressed that, in addition to preparing statutory provisions, the Working Group should engage in the preparation of a model communication agreement for optional use between EDI users. It was explained that most attempts to solve legal problems arising out of the use of EDI currently relied on a contractual approach. That situation created a need for a global model to be used when drafting such contractual arrangements. It was stated in reply that the preparation of a standard communication agreement for universal use had been suggested at the twenty-fourth session of the Commission. The Commission, at that time, had decided that it would be premature to engage immediately in the preparation of a standard communication agreement and that it might be preferable, provisionally, to monitor developments in other organizations, particularly the European Communities and the Economic Commission for Europe. [3]

8. After discussion, the Commission reaffirmed its earlier decision to postpone its consideration of the matter until the texts of model interchange agreements currently being prepared within those organizations were available for review by the Commission.

9. It was suggested that, in addition to the work currently under way in the Working Group, there existed a need for considering particular issues that arose out of the use of EDI in some specific commercial contexts. The use of EDI in procurement and the replacement of paper bills of lading or other documents of title by EDI messages were given as examples of topics that merited specific consideration. It was also suggested that the Commission should set a time limit for the completion of its current task by the Working Group. The widely prevailing view, however, was that the Working Group should continue to work within its broad mandate established by the Commission. It was agreed that, only after it had completed its preparation of general rules on EDI, should the Working Group discuss additional areas where more detailed rules might be needed.

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[3] Report of the United Nations Commission on International Trade Law on the work of its twenty-fourth session, Official Records of the General Assembly, Forty-sixth Session, Supplement No. 17 (A/46/17), para. 316.

DRAFT PROVISIONS FOR UNIFORM RULES ON THE LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF TRADE DATA COMMUNICATION

CHAPTER I. GENERAL PROVISIONS

Article 1 Sphere of application*

(1) These Rules apply to a trade data message where

Variant A the sender and the recipient of such a message are in different States [at the time when the message is sent].

Variant B (a) the sender and the recipient of such a message have, at the time when the message is [prepared or] sent, their places of business in different States; or

(b) any place where a substantial part of the obligations of the commercial relationship to which the message relates or the place with which the subject-matter of the message is most closely connected is situated outside a State in which either of the parties has its place of business.

Variant C the message affects international trade interests.

(2) These Rules govern only the exchange and storage of trade data messages and the rights and obligations arising from such exchange or storage. Except as otherwise provided in these Rules, they do not apply to the substance of the trade transaction for the purpose of which a trade data message is sent or received.

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* These Rules [do not deal with issues] [do not intend to override any law] [are subject to any law] related to the protection of consumers.

References:

A/CN.9/373, paras. 21-26, and 29-33 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 7-20;
A/CN.9/360, paras. 29-31 (24th session, 1992);
A/CN.9/WG.IV/WP.53, paras. 25-33.

Remarks:

Internationality of trade data message

1. At its twenty-fifth session, the Working Group considered the question whether the uniform rules should be limited in scope to international uses of EDI or whether they should

cover both international and domestic uses of EDI. The variants contained in paragraph (1) reflect various approaches in favour of which support was expressed at the twenty-fifth session of the Working Group by those delegations whose general view was that the scope of the uniform rules should be limited to international situations (see A/CN.9/373, para. 25). The test of internationality set forth in Variant A was drawn from article 1(1) of the UNCITRAL Model Law on International Credit Transfers. The wording of Variant B was inspired from article 1(3) of the UNCITRAL Model Law on International Commercial Arbitration. Variant C makes use of a test of internationality adopted in some States for distinguishing between international and domestic arbitration (e.g., Article 1492 of the French nouveau code de procédure civile).

2. It may be noted that the wordings of Variants A and B could apply to trade data message actually transmitted between a sender and a recipient and also to a trade data message stored by a recipient. Depending upon the definition of a "trade data message", they could also be made applicable to a computer record created as a result of the computerization of trade data transmitted by means of a paper document. However, both of those variants imply a transmission of data and would not cover computer records created outside the context of such a transmission. Variant C does not imply a transmission of data and would cover at the same time messages transmitted between a sender and a recipient and computer records stored without any assumption that the data would be transmitted.

3. It may be extremely difficult to distinguish, in practice, between international and domestic uses of EDI. For example, the issuer of an offer to contract, whose offer is circulated by means of an open network, would typically not know in advance where the acceptance will come from. Furthermore, even for those situations where a test of internationality could be used to produce such a distinction between international and domestic transactions, the situation of EDI users might be adversely affected if two different legal regimes applied to international and to domestic transactions. It may be recalled that an important purpose of the uniform rules is to facilitate the use of EDI by establishing the legal effectiveness of communications effected by electronic means. The Working Group may wish to discuss whether it is conceivable and desirable to produce a situation where, for example, the evidential value of an invoice transmitted as an EDI message or its admissibility for regulatory purposes would be treated differently according to whether the transmission had taken place in an international or in a domestic context, while the commercial nature of the underlying transaction (e.g., a sale of goods) was the same in both cases.

4. In order for a State to apply the uniform rules to both domestic and international messages, article 1 might be modified as follows:

"These Rules apply to trade data messages as defined in article 2."

Messages as focus of the uniform rules

5. Draft paragraph (2) is intended to reflect the decision made by the Working Group at its twenty-fifth session that the initial focus of the uniform rules should be trade data messages and not transactions or contracts that resulted from the exchange of such messages, except as necessary (see A/CN.9/373, para. 26).

Consumer transactions

6. At its twenty-fifth session, the Working Group was agreed that, while the uniform rules should not address special issues relating to the protection of consumer, they should apply to all messages, including messages to or from consumers. It was pointed out that the uniform rules were likely to improve the position of consumers by increasing legal certainty in their transactions. However, in line with its decision that the uniform rules should focus on messages and not on the underlying contracts or obligations for the purposes of which messages were sent, the Working group generally felt, however, that the uniform rules should not provide a definition of consumer transactions. A preference was thus expressed for dealing with the issue of consumer protection in a footnote, a drafting technique that could circumvent the need to provide a definition of consumer.

7. The draft text of the footnote would allow States, when implementing the uniform rules, to include a definition of "consumers", which might include certain kinds of businesses for which it might be felt appropriate to establish particularly protective rules.

Article 2. Definitions

For the purposes of these Rules:

(a) "Trade data message" means a set of trade data exchanged [or stored] by means of electronic data interchange (EDI), telegramme, telex, telecopy or other [analogous] means of teletransmission [or storage] of [digitalized] data, [to the exclusion of purely oral communication] which [inherently] provides a complete record of the data;

(b) "Electronic data interchange (EDI)" means the computer-to-computer transmission of business data in a standard format.

(c) "Sender" means any person who originates a trade data message covered by these Rules [on its own behalf [or any person on whose behalf a trade data message covered by these Rules purports to have been sent];

(d) "Recipient" means a person who ultimately receives a trade data message covered by these Rules or who is ultimately intended to receive such a message;

(e) "Intermediary" means an entity which, as an ordinary part of its business, engages in receiving trade data messages covered by these Rules and is expected to forward such messages to their recipients. [An intermediary may perform such functions as, inter alia, formatting, translating and storing messages.]

References:

A/CN.9/373, paras. 11-20, 26-28, and 35-36 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 23-26.

Remarks:

Trade data message

1. The reference to "trade data message", as well as the suggested title of the uniform rules, is intended to reflect the approach taken by the Working Group at its twenty-fourth and twenty-fifth sessions according to which, in preparing the uniform rules, the Working Group would have in mind a broad notion of EDI, covering a variety of trade-related uses of EDI that might be referred to broadly under the rubric of "electronic commerce". Considering that the notion of EDI tends to be interpreted narrowly as the computer-to computer exchange of standardized data, it is submitted that "messages", which are to constitute the focus of the uniform rules should not be designated for all purposes as "EDI messages".

2. The notion of a "trade data message" was used in the text of the Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission (UNCID Rules) published by the International Chamber of Commerce (ICC) in 1987. The text of the UNCID Rules is reproduced as an annex to document A/CN.9/WG.IV/WP.53. The UNCID Rules define a "trade data message" as trade data exchanged between parties concerned with the conclusion or performance of a trade transaction. It is submitted that the draft definition contained in this note is not incompatible with the UNCID Rules.

3. The broad definition of a "trade data message" is intended to accommodate the concerns expressed at the twenty-fifth session that the uniform rules should be applicable not only to narrowly defined EDI messages but also to such techniques as telex and telecopy (see A/CN.9/373, para. 12) and not only to messages that were communicated between the parties but also to computer records (see A/CN.9/373, para. 81). In the preparation of the draft uniform rules, it was assumed that all elements of that broad definition would be retained.

Electronic data interchange (EDI)

4. While the Working Group, at its twenty-fourth and twenty-fifth sessions, decided to postpone its final decision as to the definition of EDI, it is submitted that, if EDI is to be listed among other means of data transmission and storage covered by the uniform rules, a definition is needed and that definition should be the narrow definition used, for example, for the purposes of UN/EDIFACT messages, a definition along the lines of those also used in many existing model communication agreements.

Sender, recipient and intermediary

5. Under the draft definition in subparagraph (c) the person who stores trade data in a computer would be the sender of a message. The wording between square brackets would include the purported sender in the definition of a sender.

Article 3. Interpretation of the Uniform Rules

(1) In the interpretation of these Rules, regard is to be had to their international character and to the need to promote uniformity in their application and the observance of good faith in international trade.

(2) Questions concerning matters governed by these Rules which are not expressly settled in them are to be settled in conformity with the general principles on which these Rules are based or, in the absence of such principles, in conformity with the law applicable by the virtue of the rules of private international law.

References:

A/CN.9/373, paras. 38-42 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 30-31.

Remarks:

1. The draft article is modelled on article 7 of the United Nations Sales Convention.

Article 4. Rules of interpretation

(1) For the purposes of these Rules, statements made by and other conduct of a party are to be interpreted according to that party's intent where the other party knew or could not have been unaware what the intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

References:

A/CN.9/373, paras. 38-42 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 30-31.

Remarks:

1. The draft article is modelled on article 8 of the United Nations Sales Convention.

Article 5. Variation by agreement

Except as otherwise provided in these Rules, the rights and obligations of the sender and the recipient of a trade data message arising out of these Rules may be varied by their agreement.

References:

A/CN.9/373, para. 37 (25th session, 1993);

A/CN.9/WG.IV/WP.55, paras. 27-29.

Remarks:

1. The wording of draft article 5 is modelled on article 4 of the UNCITRAL Model Law on International Credit Transfers.

CHAPTER II. FORM REQUIREMENTS

Article 6. Functional equivalent of "writing"

(1) Variant A "Writing" includes but is not limited to a telegram, telex [, telecopy, EDI message, electronic mail] and any other trade data message which preserves a record of the information contained therein and is capable of being reproduced in [tangible] [human-readable] form [or in any manner that would be prescribed by applicable law].

Variant B In legal situations where "writing" is required [explicitly or implicitly], that term shall be taken to mean any entry on any medium able to transmit in toto the data in the entry, which must be capable of being [intentionally recorded or transmitted and] reproduced in human-readable form.

Variant C Any form of electronic [or analogous] recording of information is deemed to be functionally equivalent to writing, provided the information can be reproduced in visible and intelligible form and provided the information is preserved as a record.

Variant D (a) For the purpose of any rule of law which expressly or impliedly requires that certain information be recorded or presented in written form, any form of electronic [or analogous] recording of information is deemed to be equivalent to writing, provided the electronic [or analogous] record fulfils the same functions as a paper document.

(b) In determining whether a record satisfies the functions of a writing, due regard shall be had to any agreement between the parties as to the status of that recording.

(2) For the purposes of this article, "record" means a durable symbolic representation of information in objectively perceivable form, or susceptible to reduction to objectively perceivable form.

(3) The provisions of this article do not apply to the following situations: [...]

References:

A/CN.9/373, paras. 45-61 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 39-49;

A/CN.9/360, paras. 32-43 (24th session, 1992);
A/CN.9/WG.IV/WP.53, paras. 37-45;
A/CN.9/350, paras. 68-78;
A/CN.9/333, paras. 20-28.

Remarks:

Extended definition of "writing"

1. At the twenty-fifth session of the Working Group, support was expressed by some delegations in favour of an extended definition of "writing". That approach is reflected in the text of Variants A and B, which were proposed at the twenty-fifth session. It is submitted that an extended definition of "writing" such as the one contained in article 13 of the United Nations Sales Convention is useful in the context of a legal text which expressly provides for certain legal consequences by reference to whether certain data are presented in writing. However, such an extended definition may be insufficient to cover all situations where legislation in a given country, while not expressly requiring the presentation of paper documents, is drafted in such a manner that it can only apply in a paper-based environment. Such a situation is not uncommon, as a consequence of the fact that rights and obligations were generally established on the assumption that data was normally presented in paper form.

2. If any of those two variants were retained, the text might need to be supplemented by a paragraph along the following lines: "the above paragraph applies where the context or use of such words as 'document' implies that a writing is required".

3. It may be noted that in certain standard interchange agreements such as the European Model EDI Agreement a different approach is taken, under which no attempt is made to create an equivalent to written documents. Instead, the conditions under which computer data would carry legal significance are directly established.

Functional equivalent to "writing"

4. Variants C and D do not rely on an extended definition of "writing". Rather, they attempt to create a presumption that the same legal consequences will derive from the presentation of data on paper and in other form, provided that the functions fulfilled by both types of media are equivalent. Variant D, for which support was expressed at the twenty-fifth session of the Working Group, expressly refers to some of the functions performed by paper. It may be recalled that other functions of paper were also identified by the Working Group at its previous sessions. However, it was also noted by the Working Group that not all paper documents performed the same functions and that all express or implied requirements that data be presented in written form were not always based on the assumption that the medium on which the information was to be presented performed all the conceivable functions of paper. It might be excessively burdensome for EDI users to require all electronic or analogous recordings of data to perform all the functions of paper. Variant D only states a general principle and would leave it to courts or to other legal rules to establish in each case what a functional equivalent to paper would be.

5. It may be recalled that functional equivalence to "writing" is not to be confused with other levels or elements, such as authentication. The mere fact that a requirement of "writing"

is fulfilled does not mean that other requirements are fulfilled. As an illustration of that distinction, it may be noted that article 28 of the UNCITRAL Model Law on Procurement of Goods and Construction provides that "a tender shall be submitted in writing, signed and in a sealed envelope" and that "a tender may alternatively be submitted in any other form specified in the solicitation documents that provided a record of the content of the tender and at least a similar degree of authenticity, security and confidentiality". While the notion of a "record", has already been used as an equivalent for "writing" in previous UNCITRAL texts such as article 1 of the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, additional requirements of authenticity, security and confidentiality are treated separately.

Notion of "record"

6. The definition of a "record" is derived from a concept under study within the Subcommittee on Electronic Commercial Practices of the American Bar Association (see A/CN.9/WG.IV/WP.55, para. 47).

Possibility of derogation

7. At its previous session, the Working Group discussed the relationships between EDI users and public authorities and considered transactions involving special form requirements (A/CN.9/373, paras. 45-49). A general concern was expressed by certain delegations that the Uniform Rules should not attempt to override mandatory form requirements imposed for reasons of regulatory policy or ordre public (see A/CN.9/373, paras. 48-49). A related concern was that an extended definition of "writing" might lead to the undesirable result of validating the dematerialization of instruments for which States might wish to maintain the paper-based form, for example in the area of cheques and securities (see A/CN.9/373, para. 56). It is submitted that, should an extended definition of "writing" be adopted, a general provision should allow States to make exceptions to the definition in the instrument by which they implement the uniform rules at the national level.

8. Draft paragraph (2) would allow States to list specific transactions or areas of law where the use of trade data messages as a replacement for paper would not be permitted. Such a provision would underscore the fact that, under the uniform rules, trade data messages would normally be acceptable in replacement for paper while the obligation to produce paper documents would result from an exception to that general rule.

Article 7. Functional equivalent of "signature"

(1) Where the signature of a person is required by any rule of law, that requirement shall be deemed to be fulfilled in respect of a trade data message if

(a) a method is used to identify the sender of the message and the mode of identification of the sender is in the circumstances a [commercially] reasonable method of security against unauthorized messages; or

(b) a method for the identification of the sender has been agreed between the sender and the recipient of the message and that method has been used.

(2) In determining whether a method of identification of the sender of a message is [commercially] reasonable, factors to be taken into account include the following: the status and relative economic size of the parties; the nature of their trade activity; the frequency at which commercial transactions take place between the parties; the kind and size of the transaction; the function of signature requirements; the capability of communication systems; compliance with authentication procedures set forth by intermediaries; the range of authentication procedures made available by any intermediary; compliance with trade customs and practice; the existence of insurance coverage mechanisms against unauthorized messages; and any other relevant factor.

(3) The provisions of this article do not apply to the following situations: [...]

References:

A/CN.9/373, paras. 63-76 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 50-63;
A/CN.9/360, paras. 71-75 (24th session, 1992);
A/CN.9/WG.IV/WP.53, paras. 61-66;
A/CN.9/350, paras. 86-89;
A/CN.9/333, paras. 50-59;
A/CN.9/265, paras. 49-58.

Remarks:

Notions of "signature and "authentication"

1. While the term "authentication" is commonly used by EDI users, designers of EDI messages and EDI security experts, it may be noted that the question of whether the content of a document is authentic is not to be confused with the question of whether a document is signed, i.e., whether its author is identified. The purpose of draft paragraph (1) is to establish the equivalence of a handwritten signature on the one hand and the use of a method which performs the function of identifying the author of the message on the other hand. Additional rules on "authentication" of the content of the message may be contained in agreements concluded between EDI users or in other applicable rules of law regarding, for example, testimony by witnesses. In the draft uniform rules, the notion of "authentication" is used in article 10 as an element to be considered in determining the binding nature of the content of a trade data message.

2. An effect of the draft provision is that, where certain data should be signed, the purported sender of such data by means of a trade data message is deemed to be the actual sender of the data and to have fulfilled the signature requirement if a method has been used to identify the sender of the message.

Notion of "commercial reasonableness"

3. The Working Group did not decide whether a "commercially reasonable" method of authentication should be required in all cases or whether parties should be allowed to agree on a less than reasonable method of authentication (see A/CN.9/373, paras. 67-68).

4. Draft paragraph (1) establishes a distinction with a view to protecting third parties or EDI users communicating in the absence of a prior agreement by saying that no unreasonable method of identification of the sender should have weight against them. However, EDI users would be free to agree, as among themselves, on the use of an unreasonable method.

Possibility of derogation

5. As for the equivalent of "writing", States would be free to list specific transactions or areas of law where the use of a method other than signature for identifying the sender of a message would not be permitted (see above comments 7 and 8 under draft article 6).

Article 8. Functional equivalent of "original"

(1) Variant A A trade data message sent electronically on any medium shall be considered to be an original with the same evidential value as if it was on paper, provided that the following conditions are met: originality is attributed to the message by the originator of the information; the message is signed and bears the time and date; it is accepted as an original, implicitly or explicitly, through the addressee's acknowledgement of receipt.

Variant B Trade data messages shall not be denied legal recognition solely as a result of the application of a requirement that a document had to be presented in original form.

Variant C Where it is required by any rule of law that a document be presented in original form, that requirement shall be fulfilled by the presentation of a trade data message or in the form of a printout of such a message if

(a) there exists reliable identification of the originator of the message; and

(b) there exists reliable assurance as to the integrity of the content of the message as sent and received; or

(c) the sender and the recipient of the message have expressly agreed that the message should be regarded as equivalent to a paper original document.

(2) The provisions of this article do not apply to the following situations: [...]

References:

A/CN.9/373, paras. 77-91 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 64-70;
A/CN.9/360, paras. 60-70 (24th session, 1992);
A/CN.9/WG.IV/WP.53, paras. 56-60;
A/CN.9/350, paras. 84-85;
A/CN.9/265, paras. 43-48.

Remarks:

1. The text of Variant A was already used as a basis for discussion by the Working Group at its twenty-fifth session (see A/CN.9/373, paras. 80-86).

2. An original document may be required for evidential or for other purposes. Where an original document is required for evidential purposes, in certain legal systems, the originality of the message determines its admissibility as evidence. This is, for example, the case of the "best evidence rule" in the common law system. In other legal systems, while admissibility might not be an issue and original documents and copies would be equally admissible, the weight carried by the evidence might differ depending upon whether the document is regarded as an original or as a copy. Variant B, the substance of which received support at the twenty-fifth session of the Working Group, would mainly address the question of admissibility of trade data messages as evidence where the presentation of an original document is normally required (see A/CN.9/373, para. 87).

3. An original document may be required for other purposes, for example to incorporate a right of property over of the goods described in a negotiable bill of lading. The original nature of the document may thus have an impact on the transferability of rights incorporated in a document of title. A bill of lading, for example, would give title to ownership of the goods only if it is an original. At this stage, the draft uniform rules do not deal with the issue of transferability of rights in an electronic environment. It is expected that the Working Group will examine the issue at a later stage (see below "further issues to be considered").

4. Variant C embodies a third approach in favour of which support was expressed at the previous session of the Working Group (see A/CN.9/373, para. 88). It states the conditions under which, where legal consequences flow from the presentation of an original document, similar consequences flow from the presentation of a trade data message.

Notion of presentation

5. Nothing in the draft uniform rules should be interpreted as precluding regulatory authorities from determining what presentation is and what software is to be maintained by EDI users.

Possibility of derogation

6. As for the equivalent to "writing" and "signature" in draft articles 6 and 7, States would be free to list specific transactions or areas of law where the obligation to present a paper original would be maintained (see above comments 7 and 8 under draft article 6 and comment 5 under article 7).

Article 9. Evidential value of trade data messages

(1) Variant A A trade data message shall be admissible as evidence, provided it is reduced to a [tangible] [human readable] form [and provided it is shown that the message has been generated and stored in a reliable manner].

Variant B In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to prevent the admission of a trade data message in evidence on the grounds that it was generated [electronically] by a computer or stored in a computer.

(2) A trade data message shall have [evidential value] [the same evidential value as a written document containing the same data] provided it is shown that the message has been generated and stored in a reliable manner.

(3) In assessing the reliability of the manner in which a trade data message was generated and stored, regard shall be had to the following factors: the method of recording data; the adequacy of measures protecting against alteration of data; the adequacy of the maintenance of data carriers; the method used for authentication of the message.

References:

A/CN.9/373, paras. 97-102 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 71-81;
A/CN.9/360, paras. 44-59 (24th session, 1992);
A/CN.9/WG.IV/WP.53, paras. 46-55;
A/CN.9/350, paras. 79-83;
A/CN.9/333, paras. 29-41;
A/CN.9/265, paras. 27-48.

Remarks:

1. Draft paragraph (1) deals with the question of admissibility of evidence, which may be of particular importance in common law countries. The aim of the provision is to eliminate the need for EDI users to demonstrate by testimony the integrity and reliability of all processing units in the network in order to establish the admissibility of messages before the Courts.

2. Draft paragraph (2) deals with the question of the evidential weight to be carried by data presented in the form of an electronic message. The Working Group was agreed, at its twenty-fifth session that it was neither possible nor desirable to establish detailed statutory rules for weighing the probative value of EDI messages. The aim of the provision is limited to establishing the conditions under which an equivalence is to be recognized to computer data and to data produced in traditional paper form.

CHAPTER III. COMMUNICATION OF TRADE DATA MESSAGES

Article 10. [Binding nature] [Effectiveness] of trade data messages

(1) A sender [is bound by] [is deemed to have approved] the content of a trade data message [or an amendment or revocation of a trade data message] if it was issued by the sender [on its own behalf] or by another person who had the authority to bind the sender.

(2) When a trade data message [or an amendment or revocation of a trade data message] is subject to authentication, a purported sender who is not bound under paragraph (1) is nevertheless [bound] [deemed to have approved the content of the message] if

(a) the purported sender and the recipient have agreed to certain authentication procedures;

(b) the authentication is in the circumstances a commercially reasonable method of security against unauthorized trade data messages; and

(c) the recipient complied with the authentication.

(3) The sender and the recipient of a trade data message [are] [are not] permitted to agree that a purported sender is bound under paragraph (2) if the authentication is not commercially reasonable in the circumstances.

(4) A purported sender is, however, not bound under paragraph (2) if it proves that the message as received by the recipient resulted from the actions of a person other than

(a) a present or former employee of the purported sender, or

(b) a person whose relationship with the purported sender enabled that person to gain access to the authentication procedure.

The preceding sentence does not apply if the recipient proves that the trade data message resulted from the actions of a person who had gained access to the authentication procedure through the fault of the purported sender.

(5) A sender who is bound by the content of a trade data message is bound by the terms of the message as received by the recipient. However, the sender is not bound by an erroneous duplicate of, or an error or discrepancy in, a trade data message if

(a) the sender and the recipient have agreed upon a procedure for detecting erroneous duplicates, errors or discrepancies in a message, and

(b) use of the procedure by the recipient revealed or would have revealed the erroneous duplicate, error or discrepancy.

[Paragraph (5) applies to an error or discrepancy in an amendment or a revocation message as it applies to an error or discrepancy in a trade data message].

References:

A/CN.9/373, paras. 109-115 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 82-86.

Remarks:

Chapter III

1. Draft chapter III contains a number of rules that are intended to apply to communication of trade data messages between commercial parties in the absence of a prior agreement between them. These rules are of a kind generally found in communication agreements. The Working Group may wish to decide to what extent rules in that area could be deviated from by contract.

Article 10

2. The text of draft article 10 is based on article 5 of the UNCITRAL Model Law on International Credit Transfers. The effect of the provision is that the purported sender is taken to have approved the content of the message as received if an authentication procedure has been used.

3. The Working Group may wish to discuss whether the issues of revocation or amendment of the content of trade data messages should be dealt with under the uniform rules.

Article 11. Obligations subsequent to transmission

(1) This article applies when:

(a) senders and recipients of trade data messages have agreed on the use of acknowledgements of receipt of messages;

(b) the use of acknowledgements of receipt of messages is requested by an intermediary;

(c) the sender of a trade data message requests an acknowledgement of receipt of the message in the message or otherwise.

(2) Any sender may request an acknowledgement of receipt of the message from the recipient.

(3) Variant A [The recipient of a message requiring an acknowledgement shall not act upon the content of the message until such acknowledgement is sent.] [The recipient of a message requiring an acknowledgement who acts upon the content of the message before such acknowledgement is sent does so at its own risks.]

(6) If the sender does not receive the acknowledgement of receipt within the time limit [agreed upon, requested or within reasonable time], he may, upon giving prompt notification to the recipient to that effect, treat the message as null and void.

Variant B An acknowledgement, when received by the originating party, is [conclusive] [presumptive] evidence that the related message has been

received [and, where confirmation of syntax has been required, that the message was syntactically correct]. [Whether a functional acknowledgement has other legal effects is outside the purview of these Rules.]

References:

A/CN.9/373, paras. 116-122 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 87-93;
A/CN.9/360, para. 125 (24th session, 1992);
A/CN.9/WG.IV/WP.53, paras. 80-81;
A/CN.9/350, para. 92;
A/CN.9/333, paras. 48-49.

Remarks:

Notion of "functional acknowledgement"

1. The draft article contains no definition of an acknowledgement of receipt. It is submitted that the concept of acknowledgement is self-explanatory. However, as an example of a possible definition of "acknowledgement", it may be noted that the following is being considered in the preparation of the European Model EDI Agreement:

> "The acknowledgement of receipt of a message is the procedure by which, on receipt of the message, the syntax and semantics are checked, and a corresponding acknowledgement is sent."

However, while such a definition may be suitable for EDI technique, it might not be applicable to less advanced communication techniques.

Article 12. Formation of contracts

(1) A contract concluded by means of trade data messages shall not be denied legal [validity] [recognition] [and parties to that contract may not contest its validity] on the sole ground that the contract was concluded by such means.

(2) A contract concluded by means of trade data messages is formed at the time [and place] where the message constituting acceptance of an offer is received by the recipient.

References:

A/CN.9/373, paras. 126-133 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 95-108;
A/CN.9/360, paras. 76-95 (24th session, 1992);
A/CN.9/WG.IV/WP.53, paras. 67-78;
A/CN.9/350, paras. 93-108;
A/CN.9/333, paras. 60-75.

Remarks:

1. It may be noted that the draft provision may affect the substance of the underlying commercial transaction in that it deals with the existence and validity of a contract concluded by means of trade data messages. The Working Group may wish to decide whether, in the area of contract formation, the uniform rules should deviate from the principle set forth in article (1) according to which the uniform rules should focus on the exchange and storage of data (see above comment 5 under draft article (1).

Article 13. Receipt of trade data messages

A trade data message is received by its recipient

Variant A at the time when it [reaches] [enters] [is made available to and is recorded by] the [computer system] [mailbox] [address] of [or designated by] the recipient.

Variant B (a) at the time when the message is recorded on the computer system directly controlled by the recipient in such a way that it can be retrieved; and

(b) at the place where the recipient has its place of business.

References:

A/CN.9/373, paras. 134-146 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 95-108;
A/CN.9/360, paras. 76-95 (24th session, 1992);
A/CN.9/WG.IV/WP.53, paras. 67-78;
A/CN.9/350, paras. 93-108;
A/CN.9/333, paras. 60-75.

Remarks:

1. While the question of the time and place of receipt of a message has been previously discussed by the Working Group in the context of formation of contracts, it is submitted that a general provision should deal with the time of receipt of all messages, irrespective of the purpose for which they are sent.

2. As to the place where messages are received, a suggestion was made at the twenty-fifth session of the Working Group that the relevant place was the place where the recipient kept its computer facilities. However, it was generally felt that, in many instances, that place would be irrelevant since the country in which the recipient kept its computer facilities might have no other connecting factor to the transaction or to the parties.

3. The draft provision provides a rule for determining the time and place of receipt of a message. It is not intended to deal with the question of whether a message received has legal effects.

4. The draft provision does not affect the possible application of other rules of law to demonstrate receipt of a message.

Article 14. Recording and storage of trade data messages

(1) Variant A This article applies where records are required to be kept by applicable legislation or regulation or by any contractual provisions.

Variant B Subject to any contrary requirement in legislation, where a requirement exists with respect to the retention of records, that requirement [shall] [may] be satisfied if the records are kept in the form of trade data messages provided that the requirements contained in paragraphs (2) and (3) of this article are satisfied.

(2) Trade data messages shall be stored by the sender in the transmitted format and by the recipient in the format in which they are received.

(3) Electronic or computer records of the messages shall be kept readily accessible and shall be capable of being reproduced in a human readable form and, if required, of being printed. Any operational equipment required in this connection shall be retained.

References:

A/CN.9/373, para. 123-125 (25th session, 1993)
A/CN.9/WG.IV/WP.55, para. 94.

Remarks:

1. At its twenty-fifth session, the Working Group generally felt that it would be desirable to have a rule validating storage of records in electronic or similar form, since the rule would increase opportunities for reducing the cost of storage of records (see A/CN.9/373, para. 124).

2. However, the draft provision is intended to make it clear that States should not be obliged to modify specific national requirements on the keeping of records. In particular, supervisory authorities should not bear the cost of maintaining the equipment needed to make the data stored readable in a human language.

[Article 15. Liability

(1) Each party shall be liable for damage arising directly from failure to observe any of the provisions of the uniform rules except in the event where the party is prevented from so doing by any circumstances which constitute an impediment beyond that party's control and which could not reasonably be expected to be taken into account at the time when that party engaged in sending and receiving EDI messages or the consequences of which could not be avoided or overcome.

(2) In no event shall either party be liable for special, indirect, or consequential damage.

(3) If a party engages any intermediary to perform such services as the transmission, logging or processing of a message, the party who engages such intermediary shall be liable for damage arising directly from that intermediary's acts, failures or omissions in the provision of the said services.

(4) If a party requires another party to use the services of an intermediary to perform the transmission, logging or processing of an EDI message, the party who requires such use shall be liable to the other party for damage arising directly from that intermediary's acts, failures or omissions in the provision of the said services.]

References:

A/CN.9/373, paras. 148-152 (25th session, 1993);
A/CN.9/WG.IV/WP.55, paras. 114-123;
A/CN.9/360, paras. 97-103 (24th session, 1992);
A/CN.9/WG.IV/WP.53, paras. 82-83;
A/CN.9/350, paras. 101-103;
A/CN.9/333, para. 76.

Remarks:

1. The question of including a possible rule on liability in the uniform rules was only touched upon briefly by the Working Group at the end of its twenty-fifth session. The text of draft article 15 was drawn from the European Model EDI Agreement prepared in the context of the TEDIS programme carried out within the Commission of the European Communities (see A/CN.9/350, paras. 11-26). This text has been included in the draft uniform rules as an illustration of a provision prepared against the background of a variety of legal systems and reflecting a possible approach to the issue of liability. The Working Group may wish to use this text as a basis for discussion.

2. It may be noted, however, that the text of the draft article was prepared in the form of a model contractual clause and, as such, may not be suitable for direct inclusion in a text of a statutory nature such as the uniform rules.

FURTHER ISSUES TO BE CONSIDERED

The Working Group may wish to discuss whether further issues should be dealt with in the uniform rules. Among such issues, the Working Group agreed, at its twenty-fifth session, to consider the question of liability of third-party service providers and the question of documents of title and securities. The Working Group may wish to consider what steps should be taken to address those issues. In addition, the Working Group may also wish to discuss the question of the possible interplay of the uniform rules with legal rules on personal data protection that might exist in certain countries.